ARTICLE APPEARED
ON PAGE 285

NATION
29 September 1984

NATIONAL SECURITY STATE

# Never Question The President

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Prior to the emergence of the Burger Court as a distinctive judicial voice it was possible to argue that the Supreme Court had dealt in a responsible and relatively coherent way with the task of balancing the rights of individuals with the requirements of national security. It is no longer possible to do so. In a few broad and extraordinarily dangerous decisions the Court has swept away most of the limits established in earlier cases and has laid down a standard of extreme deference to the executive branch when it asserts that certain limits on constitutional rights must be accepted to protect the national security.

In cases involving the exercise of the nation's powers in the realm of foreign affairs the Supreme Court has historically been deferential to the political branches of the government and to their findings as to what is necessary to protect the country. Until recently, however, the Court was not willing to defer when constitutional rights were at stake. It was especially vigilant when the President was acting without a clear delegation of authority from Congress.

The record is not wholly commendable. The Court refused to strike down Abraham Lincoln's limitations on habeas corpus; it upheld the basic structure of the Japanese internment program during World War II; and it was slow to rein in the excesses of McCarthyism. Nevertheless, it blocked President Truman's efforts to seize the steel mills during the Korean War, upheld the right of Americans to travel abroad and limited the government's power to refuse to hire those it considered subversive or to strip draft dodgers of their citizenship.

Indeed, as late as 1977 it was possible to write, as I did with Daniel Hoffman in our book, *Freedom vs. National Security*, that the overall record of the Court was surprisingly sensitive to claims of civil liberties when juxtaposed with claims of national security. There was not a single case in which the Court had permitted the President, acting without clear Congressional authority, to override the fundamental rights of Americans. Even when the President was acting with Congressional sanction the Court had been unwilling to defer to the judgments of the political branches. Instead it made a searching inquiry to determine for itself if sufficient harm would result. Nowhere was this clearer than in the Pentagon papers case, *New York Times Co. v. United States*, in which the Court refused to accept at face value the government's claims that grave injury to the nation would result from release of the papers. Having listened to the arguments and read the secret briefs, a majority of the Court was not persuaded and would not order the newspapers that had copies to halt publication.

That decision, much praised by civil libertarians when it was handed down in 1971, was in fact the harbinger of a more deferential attitude toward national security claims. A majority of the Justices were clearly willing to contemplate situations in which they would approve a prior restraint on publication of information. Justices Byron White and Potter Stewart, who cast the swing votes in the case, demanded that at least in the absence of legislation, the government prove the publication would result in grave and irreparable harm to the national interest. However, as the government's efforts to suppress Howard Morland's 1979 story on the hydrogen bomb for *The Progressive* showed, even that standard permits stopping publication for a significant length of time while trial and appellate courts decide whether the government has met its burden of proof.

Finally, the dissenting Justices accepted the government's determination without any scrutiny whatsoever. In a little-noticed and now forgotten indication of what was to come, Justice John Marshall Harlan, speaking also for Chief Justice Warren Burger and Justice Harry Blackmun, wrote:

> I agree that . . . the judiciary must . . . [satisfy] itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. . . . [It] may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. . . .
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> But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

Today, that dissent clearly commands the support of the majority of the Court. We are just beginning to experience the full weight of this profound change. Four decisions reflect the Court's sharp break with the past.

The manner in which the Court disposed of the first of these cases, *Snepp v. United States*, in 1980, showed its utter disdain for the basic principle that had guided the Court in dealing with this issue in the past: unless based on legislative authority, claims to limit constitutional rights on grounds of national security would be rejected.

Frank W. Snepp, a former Central Intelligence Agency operative, published a book, titled *Decent Interval*, about the C.I.A.'s activities in Vietnam. The agency sought damages because he failed to clear the manuscript, and it asked the Court to impose a requirement that he submit all future writings for review before publication. The Court was so

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little troubled by the absence of any statutory basis for the C.I.A.'s action that it decided the case without benefit of briefs or oral arguments. It did not deal in any serious way with the separation-of-powers issue raised by the lack of Congressional authorization. Even the First Amendment prohibition on prior restraint was dismissed in a brief footnote:

> When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree with the Court of Appeals that Snepp's agreement is an "entirely appropriate" exercise of the CIA Director's statutory mandate to "protec[t] intelligence sources and methods from unauthorized disclosure". . . . Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. . . . The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest.

The second opinion marking the Court's radical departure from established law came a year later, in another case relating to a former C.I.A. official. In *Haig v. Agee* the Court showed no interest in finding a narrow way to uphold the government's contention that it had the authority to remove Philip Agee's passport to keep him from traveling to Iran. The executive branch claimed the right to limit an American's foreign travel whenever the Secretary of State determines such travel is "likely" to damage U.S. national security or foreign policy.

Conceding that some delegation of power from Congress was necessary, the Court found it in Congress's *failure to act* following a few scattered and ill-publicized cases in which passports were denied on national security grounds. In so doing the Court ignored—as it was to do again in last term's Cuban travel case, *Regan v. Wald*—a 1977 amendment to the Passport Act that severely limits the executive branch's power to curtail travel.

Once it had established Congressional authorization, the Court was unwilling to balance the proposed restriction on Agee's First Amendment rights against the possible harm of his trip. It simply declared, contrary to the decision in *Kent v. Dulles* (1957), that there was no such right. Thus the Secretary of State is free to deny passports for any travel that he believes is likely to injure national security or American foreign policy, as he defines it.

The full import of the *Agee* decision was made clear by Justice William Rehnquist, writing for the majority in *Regan*. Taking some language from a 1965 decision out of context, he held that free speech is involved only if restrictions are based on the beliefs of the would-be traveler. If the government denies a passport to someone who wants to go to a country to find out what is going on there, the First Amendment is not at issue. So much for the right to know.

Rehnquist then gave short shrift to the Fifth Amendment right to travel. It is "insufficient to overcome the foreign policy justifications supporting the restriction," he wrote. Neither the citizen nor the courts can challenge the government's evidence of the need or value of the restriction in support of foreign policy objectives—"given the traditional deference to executive judgment." Rehnquist seems not to know or care that there is no precedent for such deference in cases relating to constitutional rights.

The final case in this brief but devastating list also illustrates the Court's unwillingness even to take account of legislation designed to limit the powers of the President in relation to national security. Just as Rehnquist did not think Congress's amendment to the Passport Act was relevant to a travel case, so he ignored the 1974 amendments to the Freedom of Information Act [see sidebar] in his opinion for the Court in *Weinberger v. Catholic Action of Hawaii/Peace Education Project* (1981). The Court merely accepted the government's assertion that it could not confirm or deny the presence of nuclear weapons at a particular location on the ground that the information was classified. In so doing, it ignored a provision of the F.O.I.A. that requires courts to determine on their own whether information is properly classified. It did not insist on the assurance of a senior official, as Justice Harlan would have required in the Pentagon papers case, let alone the proof that a judge finds persuasive, as the F.O.I.A. clearly demands.

The recent decisions of the Burger Court in national security cases add up to this: If the executive branch asserts that injury to the nation's foreign policy would result from the actions of its citizens, the Court will accept that judgment without any independent inquiry. Moreover, it will accept the President's definition of what needs to be done to avoid the injury without making its own determination of whether that is the least intrusive means. Finally it will permit the President to act without Congressional authorization or it will, if necessary, stretch a point to find that authorization.

The trouble we face is underscored by Justice Lewis

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Powell's dissent in the Cuban travel case, in which he warned his colleagues that their job was to determine what the law is and not what they think would be good policy. Anyone who would defend these decisions as signaling an end to judicial activism needs to contend with his clear and brief dissent:

> As the Solicitor General argues, the judgment of the Court may well be in the best interest of the United States. The regulations upheld today limit Cuba's ability to acquire hard currency, currency that the Executive has found might be used to support violence and terrorism. Our role is limited, however, to ascertaining and sustaining the intent of Congress. It is the responsibility of the President and Congress to determine the course of the nation's foreign affairs. In this case, the legislative history canvassed by Justice Blackmun's dissenting opinion unmistakably demonstrates that Congress intended to bar the President from expanding the exercise of emergency authority under Sec. 5 (b) [claimed by the President].

In 1967, in a case striking down a statute making it unlawful for a member of the Communist Party to work in a defense plant (*United States v. Robel*), the Court pointed out that claims of national security cannot be invoked as a "talismanic incantation" to support any exercise of power that would violate constitutional rights. Two decades later such claims do, in the eyes of this Court, sweep everything before them. □

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